

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE CLOROX CONSUMER LITIGATION) Master File No. 12-00280 SC
)
) ORDER GRANTING IN PART AND
) DENYING IN PART MOTION FOR
) JUDGMENT ON THE PLEADINGS

This Document Relates To:

12-00764 SC
12-00356 SC
12-00649 SC
12-01051 SC

I. INTRODUCTION

Plaintiffs bring this putative class action against Defendant The Clorox Company ("Clorox") in connection with its marketing and advertising of Fresh Step cat litter.¹ Clorox's advertising represents that Fresh Step is the only cat litter that uses carbon, and that Fresh Step is better at eliminating cat waste odors than other brands of cat litter that use baking soda. Plaintiffs allege

¹ Plaintiffs are Megan Sterritt and Jose Segarra, citizens of Florida (collectively, the "Florida Plaintiffs"); Kristin Luszcz, a citizen of New York (the "New York Plaintiff"); Lori Kowalewski, a citizen of New Jersey (the "New Jersey Plaintiff"); Tina Butler-Furr and Catherine Lenz, citizens of Texas (the "Texas Plaintiffs"); and Susan Doyle, a citizen of California. Each plaintiff seeks to represent a class of Fresh Step purchasers from his or her respective state.

1 that recent studies commissioned by Clorox's competitor, Church &
2 Dwight ("C&D"), show that Clorox's advertisements are demonstrably
3 false. Clorox now moves for judgment on the pleadings, primarily
4 on the ground that Plaintiffs have failed to allege an injury in
5 fact. ECF No. 71 ("Mot."). The motion is fully briefed, ECF Nos.
6 74 ("Opp'n"), 76 ("Reply"), and appropriate for determination
7 without oral argument per Civil Local Rule 7-1(b). For the reasons
8 set forth below, the Motion is GRANTED in part and DENIED in part.
9

10 **II. BACKGROUND**

11 In 2010 and 2011, Clorox aired a series of commercials
12 representing that its carbon-based Fresh Step cat litter is "better
13 at eliminating litter box odors" than C&D's Super Scoop, a rival
14 brand of cat litter that uses Arm & Hammer baking soda. Based on
15 these commercials, C&D twice sued Clorox for violations of the
16 Lanham Act. In connection with these lawsuits, C&D alleged that it
17 had commissioned an independent laboratory to conduct a ten-day
18 sensory study, involving a panel of persons trained in odor
19 evaluation, that compared Fresh Step to one of C&D's baking soda-
20 based cat litters. C&D further alleged that, on every single day
21 of the study, and overall across all days, the panelists' average
22 rating for C&D's baking soda-based litter was lower than the
23 average rating for Fresh Step, with a lower rating representing a
24 more palatable odor. Both of C&D's suits settled before the court
25 could render a judgment on the merits.

26 In the instant action, a number of consumers are attempting to
27 piggyback on the studies commissioned in connection with the C&D
28 lawsuits. Plaintiffs allege that Clorox charges a premium for

1 Fresh Step, and that they would not have paid that premium but for
2 Clorox's claims that carbon-based cat litter is superior to baking-
3 soda-based cat litter. Specifically, Plaintiffs allege that a 25-
4 pound box of Clorox's Fresh Step costs \$10.77, or \$0.43 per pound,
5 while a 25-pound box of Clorox's Scoop Away cat litter brand (which
6 does not contain carbon) costs \$9.37, or \$0.37 per pound.
7 Plaintiffs also allege that a 20-pound box of C&D's baking-soda-
8 based Super Scoop costs \$7.88, or \$0.39 per pound.

9 Plaintiffs assert causes of action for violations of the
10 consumer protection laws of California, Florida, New Jersey, New
11 York, and Texas, as well as claims for breach of express warranty
12 and unjust enrichment under the laws of those states. Plaintiffs
13 seek to certify California, Florida, New Jersey, New York, and
14 Texas subclasses. Clorox previously moved to dismiss. ECF No. 43.
15 On August 24, 2012, that motion was granted in part and denied in
16 part. ECF No. 55 ("Aug. 24 Order"). The Court left Plaintiffs'
17 causes of action largely undisturbed to the extent that they were
18 predicated on Clorox's carbon-superiority claims. Id. In its
19 motion for judgment on the pleadings, Clorox raises a new set of
20 arguments for dismissing Plaintiffs' causes of action.

21

22 **III. LEGAL STANDARD**

23 "After the pleadings are closed -- but early enough not to
24 delay trial -- a party may move for judgment on the pleadings."
25 Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when
26 the moving party clearly establishes on the face of the pleadings
27 that no material issue of fact remains to be resolved and that it
28 is entitled to judgment as a matter of law." Hal Roach Studios,

1 Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir.
2 1989). Moreover, a motion for judgment on the pleadings is subject
3 to the same standard of review as a motion to dismiss, and thus the
4 pleading must contain sufficient factual matter, accepted as true,
5 to state a claim to relief that is plausible on its face. Johnson
6 v. Rowley, 569 F.3d 40, 43-44 (2d Cir. 2009); see also United
7 States ex re. Cafasso v. General Dynamics C4 Systems, Inc., 637
8 F.3d 1047, 1055 n. 4 (9th Cir. 2011) (citing Johnson). A claim is
9 plausible on its face when the plaintiff pleads "factual content
10 that allows the court to draw the reasonable inference that the
11 defendant is liable for the misconduct alleged." Ashcroft v.
12 Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly,
13 550 U.S. 544, 556 (2007)).

14

15 **IV. DISCUSSION**

16 Defendants move for judgment on the pleadings on the grounds
17 that Plaintiffs lack standing because they have not personally
18 found Fresh Step to be less effective than other brands.
19 Defendants also argue that the New Jersey, New York, Florida, and
20 Texas claims should be dismissed. The Court addresses each
21 argument in turn.

22 **A. Article III Standing**

23 Article III of the United States Constitution provides that
24 the "judicial power of the United States" extends only to proper
25 "cases" and "controversies." The doctrine of standing that flows
26 from this language limits the federal courts' exercise of the
27 judicial power to those cases brought by plaintiffs who meet
28 certain minimum requirements. See Allen v. Wright, 468 U.S. 737,

1 750 (1984).

2
3 The irreducible constitutional minimum of Article III
4 standing contains three elements. First, the
5 plaintiff must have suffered an "injury in fact" that
6 is "concrete and particularized" and "actual or
7 imminent." Second, there must be a causal connection
8 between the injury and the conduct complained of, such
9 that the injury is fairly traceable to the action
challenged. Third, it must be likely, as opposed to
merely speculative, that the injury will be redressed
by a favorable decision."

10 Renee v. Duncan, 686 F.3d 1002, 1012 (9th Cir. 2012) (quoting Lujan
11 v. Defenders of Wildlife, 504 U.S. 555, 560, 112 (1992)) (internal
12 quotation marks, brackets, and citations omitted). "The party
13 invoking federal jurisdiction bears the burden of establishing
14 these elements." Lujan, 504 U.S. at 561.

15 Clorox argues that Plaintiffs have failed to plead injury in
16 fact, since they do not allege (1) that Fresh Step did not work as
17 advertised in reducing odors or (2) that they personally found
18 Fresh Step to be less effective than other cat litter brands. Mot.
19 at 5. Clorox reasons that Plaintiffs' injuries are hypothetical at
20 best since they have not alleged that they compared Fresh Step to
21 other brands. Id. at 8. Clorox further argues that Plaintiffs'
22 only alleged harm is that C&D claimed that its brand of cat litter
23 is more effective than Clorox's. Id. at 1. Plaintiffs concede
24 that they do not allege that Fresh Step failed to reduce cat odors,
25 but they argue that such allegations are unnecessary to establish
standing. Opp'n at 6. Plaintiffs contend that they have pled an
actual and concrete economic injury by claiming that Clorox
deceived them into paying a premium for a cat litter that studies

1 have shown is less effective at eliminating cat odors than other
2 non-carbon-based cat litters. Opp'n at 5. In reply, Clorox argues
3 that Plaintiffs' concession is fatal. Clorox contends that
4 Plaintiffs cannot show injury in fact if they never actually
5 experienced the alleged inferiority of Fresh Step. Reply at 4.
6 Clorox further argues that C&D's claim that Fresh Step is inferior
7 to Super Scoop and other baking-soda-based cat litters is
8 irrelevant to determining whether Plaintiffs were harmed. Id.

9 The Court agrees with Plaintiffs. As an initial matter, even
10 if Fresh Step did eliminate cat odors, it did not perform as
11 advertised if it was worse at eliminating odors than other baking-
12 soda-based cat litters. Further, if Fresh Step is in fact
13 objectively inferior at eliminating cat odors, it is irrelevant
14 that Plaintiffs did not experience that inferiority first hand.
15 Clorox's position implicitly requires the Court to assume that
16 there is no way to objectively measure or compare the effectiveness
17 of various cat litters. Clorox is essentially arguing that a
18 consumer cannot possibly know that Super Scoop is better or worse
19 than Fresh Step at fighting odors until he or she personally tries
20 both products. According to Clorox, a person's taste in cat
21 litter, like a person's taste in food, is a matter of personal
22 preference. That may be so. However, at this stage, the Court
23 must take all well-pleaded factual allegations as true. According
24 to the complaint, C&D studies show that baking-soda-based cat
25 litters are objectively better at reducing cat odors than Fresh
26 Step. The notion that one cat litter is objectively better at
27 fighting odors is not implausible. Indeed, that is the very claim
28 that Clorox makes in its own advertisements. In sum, Clorox's

1 arguments raise factual issues that are not suitable for
2 determination on a motion for judgment on the pleadings.²

3 Clorox also cites to a number of cases finding a lack of
4 standing where the plaintiffs alleged that they had purchased a
5 defective or potentially dangerous product, but admitted that they
6 had not been injured by the product or that the product had
7 performed as advertised with respect to them.³ For example, Rivera
8 involved a pain medication which had been withdrawn from the market
9 after reports of liver failure among long-term users. 283 F.3d at

10 _____
11 ² In its reply brief, Clorox offers a hypothetical example that
12 purportedly shows that Plaintiffs have not suffered an injury in
fact:

13 PepsiCo unveils an ad touting that "taste tests show
14 that seven out of ten adults prefer Pepsi to Coke." A
15 consumer buys Pepsi, enjoys the drink, and continues
16 to buy it. Coca-Cola then issues a competing
17 advertising campaign based on its own consumer survey,
proclaiming that Pepsi's taste tests were flawed. The
Pepsi consumer -- who enjoyed the Pepsi he bought,
never bought Coke, and never personally found Coke to
be preferable to Pepsi -- plainly has no standing to
sue PepsiCo because he has suffered no harm. The fact
that Coca-Cola may dispute the accuracy of Pepsi's
commercials has no bearing on whether that Pepsi
consumer personally suffered any injury.

18 Reply at 3. The problem with this hypothetical is that the taste
19 of a soft drink is not amenable to objective measurement. In
contrast, according to Plaintiffs, the odor-fighting abilities of
cat litter are amenable to objective measurement. Thus, a more apt
hypothetical would involve Pepsi representing that its product had
fewer calories than Coke. Such a representation could be proven
true or false. Further, if the representation was false, it could
potentially harm calorie-conscious consumers who choose Pepsi over
Coke. These consumers need not try Coke to show it has fewer
calories than Pepsi or otherwise prove injury.

20 _____
21 ³ Mot. at 6-8 (citing Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315
22 (5th Cir. 2002); Bowman v. RAM Med., Inc., I O-CV-4403 DMC MF, 2012
WL 1964452 (D.N.J. May 31, 2012); In re McNeil Consumer Healthcare,
Mktg. & Sales Practices Litig., MDL 2190, 2011 WL 2802854 (E.D. Pa.
July 15, 2011); Whitson v. Bumbo, C 07-05597 MHP, 2009 WL 1515597
(N.D. Cal. Apr. 16, 2009); Williams v. Purdue Pharma Co., 297 F.
Supp. 2d 171, 172 (D.D.C. 2003)).

1 317. The plaintiff sought to represent a class of patients who
2 ingested the drug but had not been injured by it. Id. The Third
3 Circuit found that the plaintiff lacked standing, reasoning: "the
4 wrongs [the plaintiff] and the class allege are those suffered by
5 other, non-class member patients." Id. at 320. The other cases
6 cited by Clorox differ only with respect to the products involved.
7 For example, Whitson concerned a child seat that allegedly caused
8 severe physical injuries to a number of babies. 2009 WL 1515597,
9 at *1-2. The plaintiff sought to represent a class of the injured,
10 but neither she nor her child had been harmed by the product. Id.
11 at *2. Following the Third Circuit's lead in Rivera, this Court
12 dismissed the action for a lack of standing. Id. at *6.

13 Clorox's cases are inapposite. Unlike the instant action, the
14 advertisements in the cited cases did not compare the defendants'
15 products to their competitors'. Accordingly, none of Clorox's
16 authority addresses the question presented here: does paying a
17 premium for a product as a result of claims of product superiority
18 constitute an injury in fact when the purportedly inferior product
19 is cheaper and more effective? To the extent that the cited cases
20 discuss economic injuries, they are distinguishable. For example,
21 in Rivera, the court rejected the plaintiff's assertion that she
22 had not received the benefit of her bargain, since, by her own
23 admission, she had paid for and received an effective pain killer.
24 283 F.3d 320. In contrast, here, Plaintiffs allege that they paid
25 a premium for an inferior product as a result of Clorox's
26 misleading advertising. In Williams, the plaintiff alleged that,
27 although he had not been physically harmed by the defendant's
28 allegedly defective drug, he had suffered an injury because the

1 defendants' promotional tactics drove up the price of the drug.
2 297 F. Supp. 2d at 176. The court rejected this argument, in part
3 because the plaintiff had not alleged that he was deceived or even
4 saw defendant's advertising. Id. at 177. Such is not the case
5 here, since Plaintiffs have alleged that they would not have paid a
6 premium for Fresh Step but for Clorox's advertising.

7 The authority cited by Plaintiffs, while not on all fours with
8 the instant action, is more persuasive. In Maya v. Centex
9 Corporation, 658 F.3d 1060, 1065 (9th Cir. 2011), the defendants
10 allegedly represented that they were building "stable family
11 neighborhoods," but were in fact selling homes to high risk buyers
12 who were more likely to default in times of economic hardship. The
13 plaintiffs, a group of homeowners in the neighborhood, alleged that
14 the defendants' practices and the resulting foreclosures reduced
15 the economic value of their own homes. Id. at 1066. The
16 defendants argued that the plaintiffs had failed to adequately
17 allege standing. Id. at 1067. The Ninth Circuit disagreed,
18 holding that the plaintiffs had pled actual and concrete economic
19 injuries by alleging that they paid more for their homes than they
20 were worth at the time of sale, as well as alleging that the
21 defendants' actions caused their homes to lose value above and
22 beyond those losses caused by general economic conditions. Id. at
23 1069, 1071.

24 Clorox contends that Maya is inapposite, reasoning that the
25 plaintiffs in that case suffered injury only because they purchased
26 homes with characteristics that they personally found undesirable.
27 Reply at 5. In contrast, argues Clorox, Plaintiffs rely upon the
28 experiences of others to establish that the litter they purchased

1 was allegedly worth less than they paid. Id. However, as
2 discussed above, Plaintiffs need not allege that they personally
3 experienced the inferiority of Fresh Step since they have alleged
4 that C&D's studies show that Clorox's carbon-based cat litter is
5 objectively worse at fighting cat odors. Further, just as the
6 plaintiffs in Maya did not need to purchase two homes to
7 demonstrate one was worse than the other, Plaintiffs need not
8 purchase two sets of cat litter to show injury.

9 For these reasons, the Court finds that Plaintiffs have
10 adequately alleged an injury in fact and declines to dismiss this
11 case for lack of standing.⁴

12 **B. New Jersey Claims**

13 The New Jersey Plaintiff asserts the following claims on
14 behalf of herself and the putative New Jersey class: (1) violation
15 of the New Jersey Consumer Fraud Act (the "NJCFA"), N.J. Stat. §
16 56:8-1, et seq., (2) breach of warranty, and (3) unjust enrichment.
17 Clorox argues that the NJCFA claim fails because Plaintiffs have
18 not alleged an ascertainable loss, the breach of warranty claim
19 should be dismissed for lack of pre-litigation notice, and the
20 unjust enrichment claim should be dismissed because New Jersey does
21 not recognize such a remedy for tortious conduct.

22 **1. NJCFA**

23 The NJCFA was intended to address "sharp practices and
24 dealings in the marketing of merchandise and real estate whereby

25
26 ⁴ Though it is not germane to this motion, the Court notes that
27 Clorox's arguments raise questions about whether this case is
28 appropriate for class certification. If, as Clorox implies,
measuring a cat litter's odor fighting abilities is a subjective
exercise, then it is hard to see how Plaintiffs' complaints could
be common to or representative of the alleged class.

1 the consumer could be victimized by being lured into a purchase
2 through fraudulent, deceptive or other similar kind[s] of selling
3 or advertising practices." Daaleman v. Elizabethtown Gas Co., 390
4 A.2d 566, 569 (N.J. 1978). To state a claim under the NJCFA, a
5 plaintiff must allege: (1) unlawful conduct by the defendant; (2)
6 an ascertainable loss on the part of the plaintiff; and (3) a
7 causal relationship between the defendant's unlawful conduct and
8 the plaintiff's ascertainable loss. Mason v. Coca-Cola Co., 774 F.
9 Supp. 2d 699, 702 (D.N.J. 2011).

10 Clorox argues that Plaintiffs have failed to satisfy the
11 second element, which requires that a plaintiff plead an
12 ascertainable loss "with enough specificity as to give the
13 defendant notice of possible damages." Torres-Hernandez v. CVT
14 Prepaid Solutions, Inc., 3:08-CV-1057-FLW, 2008 WL 5381227, at *7
15 n.3 (D.N.J. Dec. 17, 2008). Echoing its arguments on standing, see
16 Section IV.A supra, Clorox contends that Plaintiffs cannot meet
17 their burden because they have not alleged that they personally
18 found Clorox's claims of carbon-superiority to be untrue. Mot. at
19 9.

20 Plaintiffs respond that they can show an ascertainable loss
21 under the so-called benefit of the bargain theory, Opp'n at 8,
22 which "requires nothing more than that the consumer was misled into
23 buying a product that was ultimately worth less to the consumer
24 than the product he was promised." Smajlaj v. Campbell Soup Co.,
25 782 F. Supp. 2d 84, 99 (D.N.J. 2011). A plaintiff may state a
26 claim under the benefit of the bargain theory by alleging: "(1) a
27 reasonable belief about the product induced by a misrepresentation;
28 and (2) that the difference in value between the product promised

1 and the one received can be reasonably quantified." Id.

2 In reply, Clorox argues that Plaintiff cannot state a claim
3 under the benefit of the bargain theory because their claims are
4 based solely on the assertions of C&D and because they have no
5 basis to claim that the box of litter they purchased was less
6 effective than another brand of litter. Reply at 7. Clorox cites
7 to Hoffman v. Nutraceutical Corp., CIV.A. 12-5803 ES, 2013 WL
8 2650611, at *2 (D.N.J. June 10, 2013), which dismissed NJCFA claims
9 where the plaintiff alleged that the defendants' products were
10 contaminated with lead but failed to allege that the product he
11 used contained lead. In that respect, Hoffman is similar to Rivera
12 and the other no-injury products liability cases distinguished in
13 Section IV.A supra.

14 Clorox is essentially repackaging its standing arguments. As
15 discussed in Section IV.A supra, these arguments miss the mark.
16 Once again, Clorox is asking the Court to discount the C&D study
17 and assume that baking-soda-based litter is not objectively better
18 at reducing cat odors than carbon-based litter. This the Court
19 cannot do at the pleadings stage. Accordingly, the NJCFA claim
20 remains undisturbed.

21 **2. Breach of Express Warranty**

22 New Jersey adopts the Uniform Commercial Code's notice
23 requirement for express warranty claims. Luppino v. Mercedes-Benz
24 USA, LLC, CIV. 09-5582 DMC JAD, 2011 WL 2470625, at *3 (D.N.J. June
25 20, 2011). Thus, "[w]here a tender has been accepted . . . the
26 buyer must within a reasonable time after he discovers or should
27 have discovered any breach notify the seller of breach or be barred
28 from any remedy." N.J. Stat. § 12A:2-607(3)(a). "[P]roviding

1 notice pursuant to this regulation is a condition precedent to
2 filing any suit for breach of contract under Article 2 of the
3 U.C.C. or its state counterparts." Joc, Inc. v. Exxonmobil Oil
4 Corp., CIV 08-5344 (FSH), 2010 WL 1380750, at *4 (D.N.J. Apr. 1,
5 2010). Clorox argues that the New Jersey Plaintiff's claim for
6 breach of express warranty fails because she failed to provide
7 notice. Mot. at 11. Plaintiffs respond that Clorox had ample pre-
8 suit notice because of C&D's two earlier Lanham Act lawsuits.
9 Opp'n at 9-10 n.8. This argument is unavailing. The statute
10 specifically contemplates notice by the "buyer," in this case the
11 New Jersey Plaintiff. See N.J. Stat. § 12A:2-607(3)(a). The fact
12 that Clorox was sued in another jurisdiction, by another party, for
13 a different cause of action does not constitute sufficient notice
14 under the statute. Accordingly, the New Jersey Plaintiff's claim
15 for breach of express warranty is DISMISSED WITH PREJUDICE.

16 **3. Unjust Enrichment**

17 Finally, Clorox moves for judgment on the pleadings on the New
18 Jersey Plaintiff's claim for unjust enrichment. To state a claim
19 for unjust enrichment under New Jersey law, a plaintiff must allege
20 "both that defendant received a benefit and that retention of that
21 benefit without payment would be unjust." VRG Corp. v. GKN Realty
22 Corp., 641 A.2d 519, 526 (N.J. 1994). Moreover, "[t]he unjust
23 enrichment doctrine requires that the plaintiff show that it
24 expected remuneration from the defendant at the time it performed
25 or conferred a benefit on defendant and that the failure of
26 remuneration enriched defendant beyond its contractual rights."
27 Id.

28 A number of courts applying New Jersey law have held that an

1 unjust enrichment claim should be dismissed where it is based on
2 tortious conduct and there appear to be no allegations that the
3 plaintiff expected or anticipated remuneration from the defendant.
4 See Williams v. BASF Catalysts LLC, CIV.A. 11-1754 SRC, 2012 WL
5 6204182, at *20 (D.N.J. Dec. 12, 2012); Mason v. Coca-Cola Co.,
6 CIV.A. 09-0220-NLH, 2010 WL 2674445, at *7 (D.N.J. June 30, 2010);
7 Torres-Hernandez v. CVT Prepaid Solutions, Inc., 3:08-CV-1057-FLW,
8 2008 WL 5381227, at *9 (D.N.J. Dec. 17, 2008).⁵ As Plaintiffs
9 point out, other district courts have allowed claims for unjust
10 enrichment to proceed in the false advertising context. See
11 Stewart v. Beam Global Spirits & Wine, Inc., 877 F. Supp. 2d 192,
12 201 (D.N.J. 2012).

13 The Court finds more persuasive the line of cases dismissing
14 claims for unjust enrichment based on tortious conduct.
15 Accordingly, the New Jersey Plaintiff's claim for unjust enrichment
16 is DISMISSED WITH PREJUDICE.

17 C. New York Claims

18 The New York Plaintiff asserts the following claims on behalf
19 of herself and the putative New York class: (1) deceptive acts and
20 practices in violation of New York General Business Law ("GBL")
21 section 349; (2) false advertising in violation of GBL section 350,
22 et seq.; (3) breach of express warranty; and (4) unjust enrichment.
23 Clorox now moves for judgment on the pleadings on all four claims.

24 1. GBL Sections 349 and 350

25 GBL section 349 provides: "Deceptive acts or practices in the

26 _____
27 ⁵ See also Warma Witter Kreisler, Inc. v. Samsung Elecs. Am., Inc.,
28 CIV. 08-5380 (JLL), 2009 WL 4730187, at *7 (D.N.J. Dec. 3, 2009)
(dismissing claim for unjust enrichment because it was essentially
another way of stating a traditional tort claim).

1 conduct of any business, trade or commerce or in the furnishing of
2 any service in this state are hereby declared unlawful." N.Y. Gen.
3 Bus. Law § 349(a). To state a prima facie case under section 349,
4 a plaintiff must show that the defendant engaged in an act or
5 practice that is deceptive or misleading in a material way to a
6 reasonable consumer and that the plaintiff was injured by the
7 defendant's act or practice. Goshen v. Mut. Life Ins. Co. of N.Y.,
8 98 N.Y.2d 314, 324 (N.Y. 2002). "The standard for recovery under
9 [GBL section] 350, while specific to false advertising, is
10 otherwise identical to section 349." Id. at 324 n.1.

11 Clorox first argues that the New York Plaintiff's GBL claims
12 fail for a lack of cognizable injury. Mot. at 13. According to
13 Clorox, New York courts have repeatedly rejected allegations of
14 pecuniary loss arising solely from the purchase of a defendant's
15 product. Id. However, even Clorox's own authority recognizes that
16 a consumer might have a cognizable GBL claim where the consumer
17 pays a higher price for a product as a result of a defendant's
18 misrepresentations. See Small v. Lorillard Tobacco Co., Inc., 94
19 N.Y.2d 43, 57 n.5 (N.Y. 1999). Further, other courts have
20 expressly held that a plaintiff has adequately pled an injury under
21 the GBL by alleging that consumers paid a premium based on the
22 defendants' misrepresentations. See Ackerman v. Coca-Cola Co., CV-
23 09-0395 (JG), 2010 WL 2925955, at *23 (E.D.N.Y. July 21, 2010).

24 Small, the case upon which Clorox relies, does not favor
25 dismissal of Plaintiffs' GBL claims. In that case, the plaintiffs
26 alleged that tobacco companies had used deceptive marketing
27 practices to sell cigarettes and suppressed research indicating
28 that nicotine is addictive. Small, 94 N.Y.2d at 51. The

1 plaintiffs argued that they did not need to allege addiction to
2 prove injury -- rather, they claimed that they only needed to
3 allege that they would not have purchased defendants' cigarettes
4 but for defendants' deceptive marketing. Id. at 56. The court
5 disagreed, holding: "Without addiction as part of the injury claim,
6 there is no connection between the misrepresentation and any harm
7 from, or failure of, the product." Id. The court also reasoned
8 that the plaintiffs had failed to allege that the cost of the
9 cigarettes was affected by the defendants' alleged
10 misrepresentation. Id. at 56-57 & n.5. In contrast, here,
11 Plaintiffs have specifically alleged that Clorox was able to charge
12 a premium for Fresh Step by representing that Fresh Step was more
13 effective at reducing cat odors than its competitors.⁶

14 The other case cited by Clorox on this issue, Derbaremdiker v.
15 Applebee's Int'l, Inc., 12-CV-01058 KAM, 2012 WL 4482057 (E.D.N.Y.
16 Sept. 26, 2012), does not demand a different result. The plaintiff
17 in that case brought GBL claims in connection with a sweepstakes
18 offered by the restaurant chain Applebee's. The plaintiff alleged
19 that Applebee's implied that sweepstakes' participants would
20 compete only against Applebee's customers, when they actually
21 competed against the customers of thirty businesses. 2012 WL
22 4482057, at *2. The court found that the plaintiff had failed to
23 allege a cognizable injury, reasoning that the plaintiff needed to

24 ⁶ Clorox argues that Plaintiffs must plead more particularized
25 facts about the alleged price premium, reasoning that Plaintiffs
26 concede that Fresh Step is one of the most popular cat litter
27 brands and thus would likely already command a price premium. Mot.
28 at 14 n.8. The Court disagrees. It is plausible that Clorox can
charge more for Fresh Step because Clorox represents that Fresh
Step is better at eliminating odors than other brands. It is also
plausible that Fresh Step became one of the most popular brands of
cat litter through the success of Clorox's advertising.

1 allege a harm that was separate and apart from the deception
2 itself. Id. at *7. Since the sweepstakes entry made no
3 representations about the pool of participants, the court also
4 found that the plaintiff received exactly what was represented to
5 him: the chance to win a prize. Id. Here, Plaintiffs have pled an
6 actual pecuniary loss by alleging that Clorox charges a premium for
7 Fresh Step. They have also alleged that they received a cat litter
8 that is worse at reducing cat odors than the brands that Clorox
9 represented to be inferior.

10 Next, Clorox argues that the New York Plaintiff's GBL claims
11 fail because she has not alleged that she was deceived in New York.
12 Both GBL sections 349 and 350 are only actionable where the
13 defendant conducts activities "in this state," i.e., New York.
14 N.Y. Gen. Bus. Law §§ 349(a), 350. Thus, "to qualify as a
15 prohibited act under the statute, the deception of a consumer must
16 occur in New York." Goshen, 98 N.Y.2d at 325.

17 Plaintiffs respond that they meet this standard since they
18 allege that the New York Plaintiff was a citizen of New York at all
19 relevant times to this matter. Opp'n at 11. However, the "[GBL]"
20 analysis does not turn on the residency of the parties," but rather
21 whether the alleged transactions took place in New York State.
22 Goshen, 98 N.Y.2d at 325. In their opposition, Plaintiffs
23 essentially ask the court to infer from the pleadings that the New
24 York Plaintiff viewed Clorox's advertisements and purchased Fresh
25 Step in New York because she is a resident of the state. See Opp'n
26 at 11-12. In light of the pleading standards enunciated by New
27 York courts, this Court declines to make the leap. Accordingly,
28 the New York Plaintiff's GBL claims are DISMISSED, but the Court

1 GRANTS Plaintiffs leave to amend to specifically allege where the
2 New York Plaintiff was deceived.

3 **2. Express Warranty**

4 To state a claim for breach of express warranty, a plaintiff
5 must show an "affirmation of fact or promise by the seller, the
6 natural tendency of which [was] to induce the buyer to purchase and
7 that the warranty was relied upon." Schimmenti v. Ply Gem Indus., Inc.,
8 549 N.Y.S.2d 152, 154 (N.Y. App. Div. 1989) (quotations
9 omitted). The affirmation of fact or promise must have been false
10 or misleading when made. DiBartolo v. Abbott Labs., 914 F. Supp.
11 2d 601, 625 (S.D.N.Y. 2012).

12 Clorox contends that the New York Plaintiff's express warranty
13 claim fails because she has not alleged that Clorox made an
14 affirmation of fact or promise that was false when made. Mot. at
15 15. Pointing to a number of studies submitted into evidence in
16 connection with the C&D litigation, Clorox argues that it believed
17 and continues to believe that Fresh Step is more effective at
18 reducing cat odors than other brands. Id. This is a question of
19 fact, not appropriate for determination at the pleadings stage.

20 Next, Clorox argues that there was no breach because the New
21 York Plaintiff has not alleged that she personally found that Fresh
22 Step was ineffective at reducing cat odors. Id. at 15-16.
23 However, as discussed at length in Section IV.A supra, the issue is
24 not whether Fresh Step was ineffective, but whether it was less
25 effective than its competitors. Plaintiffs have plausibly alleged
26 that Fresh Step is less effective by pointing to the studies
27 commissioned by C&D.

28 ///

1 Accordingly, the New York Plaintiff's claim for breach of
2 express warranty remains undisturbed.

3 **3. Unjust Enrichment**

4 New York's high court explained the limited circumstances in
5 which a plaintiff may state a claim for unjust enrichment in
6 Corsello v. Verizon New York, Inc.:

7 The basis of a claim for unjust enrichment is that the
8 defendant has obtained a benefit which in "equity and
9 good conscience" should be paid to the plaintiff. In
10 a broad sense, this may be true in many cases, but
11 unjust enrichment is not a catchall cause of action to
12 be used when others fail. It is available only in
13 unusual situations when, though the defendant has not
14 breached a contract nor committed a recognized tort,
15 circumstances create an equitable obligation running
16 from the defendant to the plaintiff. Typical cases
are those in which the defendant, though guilty of no
wrongdoing, has received money to which he or she is
not entitled. An unjust enrichment claim is not
available where it simply duplicates, or replaces, a
conventional contract or tort claim.

17 18 N.Y.3d 777, 790 (N.Y. 2012) (citations omitted).

18 Based on Corsello, Clorox argues that the New York Plaintiff's
19 claim for unjust enrichment fails because it is duplicative of her
20 other claims for relief. Mot. at 16. Plaintiffs respond that it
21 would be premature to dismiss the claim at the pleading stage
22 because it is still unclear whether the New York Plaintiff will be
23 successful on her other claims. Opp'n at 15. The Court agrees
24 with Clorox. This is not one of those unusual situations where the
25 Court could find that the defendant is guilty of no wrongdoing but
26 still received money to which it was not entitled. If the New York
27 Plaintiff succeeds on her other claims, her claim for unjust
28 enrichment would be duplicative under New York law. On the other

1 hand, if the New York Plaintiff's other claims ultimately fail,
2 then her claim for unjust enrichment must also fail since it is
3 predicated on the same theory of deception.

4 Accordingly, the New York Plaintiff's claim for unjust
5 enrichment is DISMISSED WITH PREJUDICE.

6 **D. Florida Claims**

7 The Florida Plaintiffs assert the following causes of action
8 on behalf of themselves and the putative Florida class: (1)
9 violations of the Florida Deceptive and Unfair Trade Practices Act
10 ("FDUTPA"), Fla. Stat. § 501.201, et seq.; (2) misleading
11 advertising, id. § 817.41, et seq. (the "Florida Advertising Act");
12 (3) breach of express warranty, and (4) unjust enrichment. Clorox
13 now moves for judgment on the pleadings on all four claims.

14 **1. FDUTPA**

15 The FDUTPA is intended to "prohibit unfair, deceptive and/or
16 unconscionable practices which have transpired within the
17 territorial boundaries of [Florida] without limitation."
18 Millennium Commc'nns & Fulfillment, Inc. v. Office of Atty. Gen.,
19 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000). To state a claim
20 under the statute, a plaintiff must allege: "(1) a deceptive act or
21 unfair practice; (2) causation; and (3) actual damages." Hill v.
22 Hoover Co., 899 F. Supp. 2d 1259, 1264 (N.D. Fla. 2012). Clorox
23 moves for judgment on the pleadings on the grounds that (1) the
24 Florida Plaintiffs have not alleged actual damages, and (2) the
25 Florida Plaintiffs have not alleged that they were deceived in
26 Florida. Mot. at 17-18.

27 With respect the first argument, "[t]he measure of actual
28 damages is the difference in the market value of the product or

1 service in the condition in which it was delivered and its market
2 value in the condition in which it should have been delivered
3 according to the contract of the parties." Rollins, Inc. v.
4 Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006) (quotations
5 omitted). Clorox argues that the Florida Plaintiffs cannot
6 establish actual damages since they have not pled that Fresh Step
7 failed to meet their personal expectations. Clorox is once again
8 repackaging its standing arguments. The Court finds these
9 arguments unavailing for the reasons set forth in Sections IV.A,
10 IV.B.1, and IV.C.1 supra.

11 Clorox's second argument has more merit. An FDUTPA claim can
12 only be brought by Florida residents in connection with activities
13 occurring in Florida. See Amar Shakti Enters., LLC v. Wyndham
14 Worldwide, Inc., 6:10-CV-1857-ORL-31, 2011 WL 3687855, at *3 (M.D.
15 Fla. Aug. 22, 2011). Here, the Florida Plaintiffs have not pled
16 where they viewed the allegedly deceptive advertising, or where
17 they purchased Fresh Step. Plaintiffs argue that they have alleged
18 that Clorox disseminated false information "throughout the United
19 States," and that the Florida Plaintiffs are citizens of Florida.
20 As discussed in Section IV.C.1, this is not enough. Accordingly,
21 Plaintiffs' FDUTPA claim is DISMISSED. The Court GRANTS the
22 Florida Plaintiffs leave to amend so that they may allege a
23 connection between Clorox's alleged misconduct and the state of
24 Florida.

25 **2. The Florida Advertising Act**

26 The Florida Advertising Act declares that the dissemination of
27 "any misleading advertisement" is "fraudulent and unlawful." Fla.
28 Stat. § 817.41. Clorox argues that the Florida Advertising Act

1 claim is subject to the heightened pleading standards of Federal
2 Rule of Civil Procedure 9(b), because the claim sounds in fraud.
3 Mot. at 18. Clorox further argues that the Florida Plaintiffs have
4 failed to meet the Rule 9(b) pleading standards set forth by the
5 Eleventh Circuit. Id.

6 The Court addressed and rejected a similar argument when it
7 ruled on Clorox's earlier motion to dismiss, and it declines to
8 revisit the issue now. See Aug. 24 Order at 14-15. In any event,
9 the Eleventh Circuit decisions cited by Clorox -- neither of which
10 deals with the Florida Advertising Act -- are not binding here
11 since this Court sits in the Ninth Circuit. The Court is bound to
12 follow the law of Florida, not the federal courts that sit in that
13 state. Cf. 28 U.S.C. § 1652 ("The laws of the several states . . .
14 shall be regarded as rules of decision in civil actions in the
15 courts of the United States, in cases where they apply.").

16 Accordingly, the Florida Plaintiffs' Florida Advertising Act
17 claim remains undisturbed.

18 **3. Breach of Express Warranty**

19 Clorox moves for judgment on the pleadings on the Florida
20 Plaintiffs' breach of warranty claim on the ground that the Florida
21 Plaintiffs are not in privity with Clorox. Florida courts have yet
22 to reach a consensus on the privity requirement for claims for
23 breach of express warranty.

24 In 1953, the Florida Supreme Court held that "[t]he general
25 rule that an ultimate purchaser may not sue the wholesaler [for
26 breach of warranty] is not an absolute one and it seems to be
27 losing force with the passage of time." Hoskins v. Jackson Grain
28 Co., 63 So. 2d 514, 514 (Fla. 1953). Hoskin's holding was called

1 into question in West v. Caterpillar Tractor Co., Inc., 336 So. 2d
2 80, 92 (Fla. 1976), which noted that "warranty law in Florida has
3 become filled with inconsistencies and misapplications in the
4 judiciary's attempt to provide justice to the injured consumer,
5 user, employee, bystander, etc., while still maintaining the
6 contract principles of privity." The Florida Supreme Court has
7 since held that West bars claims for breach of implied warranty
8 where privity is lacking. Kramer v. Piper Aircraft Corp., 520 So.
9 2d 37, 39-40 (Fla. 1988).

10 However, whether or not privity is required for claims for
11 breach of express warranty remains an open question. Several
12 courts have held that Kramer and West extend the privity
13 requirement to claims for breach of express warranty. See T.W.M.
14 v. Am. Med. Sys., Inc., 886 F. Supp. 842, 844 (N.D. Fla. 1995); see
15 also Hill v. Hoover Co., 899 F. Supp. 2d 1259, 1265 (N.D. Fla.
16 2012) (citing T.W.M.). Other courts have found exceptions to the
17 privity requirement where the retailer or "middleman" is unlikely
18 to have relevant knowledge regarding the manufacturer's product.
19 See Smith v. Wm. Wrigley Jr. Co., 663 F. Supp. 2d 1336, 1343 (S.D.
20 Fla. 2009) ("[I]t defies common sense to argue that purchasers of
21 Eclipse gum presumed that the cashier at the local convenience
22 store is familiar with the scientific properties of MBE"); see also
23 Mardegan v. Mylan, Inc., 10-14285-CIV, 2011 WL 3583743, at *6 (S.D.
24 Fla. Aug. 12, 2011) (citing Smith).

25 The Court finds the latter line of cases persuasive. Here, it
26 is unlikely that retailers of cat litter have relevant knowledge
27 about the odor-fighting abilities of Fresh Step relative to its
28 competitors. Accordingly, the Florida Plaintiffs' claim for breach

1 of express warranty remains undisturbed.

2 **4. Unjust Enrichment**

3 Clorox argues that the Florida Plaintiffs' unjust enrichment
4 claim fails since it is based on the same conduct as their FDUTPA
5 and False Advertising Act claims. Mot. at 19. Plaintiffs decline
6 to contest the issue. Accordingly, the Florida Plaintiffs' unjust
7 enrichment claim is DISMISSED WITH PREJUDICE.

8 **E. Texas Claims**

9 The Texas Plaintiffs assert the following claims on behalf of
10 themselves and the putative Texas class: (1) violation of the Texas
11 Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code §
12 17.50, et seq.; (2) breach of express warranty; and (3) unjust
13 enrichment.

14 **1. DTPA**

15 The DTPA allows consumers to bring causes of action in
16 connection with three types of conduct: (1) false, misleading, or
17 deceptive acts or practices; (2) breaches of express or implied
18 warranty; and (3) any unconscionable action. Tex. Bus. & Com. Code
19 § 17.50(a). Plaintiffs assert claims under all three prongs.
20 Clorox argues that Plaintiffs have failed to allege sufficient
21 facts to support any kind of claim under the DTPA.

22 With respect to the first and second prongs, Clorox argues
23 that Plaintiffs fail to meet the heightened pleading requirements
24 of Rule 9(b). Mot. at 20-21. Specifically, Clorox contends that
25 Plaintiffs do not identify what characteristics, uses and benefits
26 Clorox falsely represented Fresh Step as having. The Court
27 disagrees. Plaintiffs specifically allege that Clorox falsely
28 represented that Fresh Step was better at reducing odors than other

1 baking-soda-based cat litters. The other Rule 9(b) arguments
2 raised by Clorox -- that Plaintiffs do not identify which
3 advertising they saw or what material information Clorox withheld -
4 - have already been addressed by the Court. See Aug. 24 Order at
5 14-15; Section IV.D.2 supra.

6 As to the third prong, unconscionability relates to "an act or
7 practice which, to a consumer's detriment, takes advantage of the
8 lack of knowledge, ability, experience, or capacity of the consumer
9 to a grossly unfair degree." Tex. Bus. & Com. Code § 17.45(5).
10 This "requires a showing that the resulting unfairness was
11 glaringly noticeable, flagrant, complete and unmitigated."
12 Chastain v. Koonce, 700 S.W.2d 579, 584 (Tex. 1985). "A slight
13 disparity between the consideration paid and the value received is
14 not unconscionable, a glaring and flagrant disparity is." Id. at
15 583. Thus, it is not enough to simply allege that a defendant took
16 unfair advantage of a plaintiff. Id. at 582. Plaintiffs' attempt
17 to characterize Clorox's alleged conduct as "grossly unfair" is a
18 stretch, especially since Plaintiffs concede that Fresh Step was
19 effective at reducing cat odor. The Court finds that, for the
20 purposes of Texas law, it is not unconscionable to charge a premium
21 of a few cents per pound for an effective cat litter.

22 Accordingly, the Texas Plaintiffs' DTPA claim is DISMISSED
23 WITH PREJUDICE to the extent that is premised on unconscionable
24 conduct. The claim remains undisturbed in all other respects.

25 **2. Breach of Express Warranty**

26 Clorox moves to dismiss the breach of express warranty claim
27 as to the Texas Plaintiffs on the ground that they did not provide
28 pre-suit notice. The Texas Business and Commerce Code provides

1 that, upon acceptance of a tender, "the buyer must within a
2 reasonable time after he discovers or should have discovered any
3 breach notify the seller of [the] breach or be barred from any
4 remedy." Tex. Bus. & Com. Code § 2.607(c)(1). "The buyer is
5 required to notify the seller that a breach of warranty has
6 occurred in order to give the seller an opportunity to inspect the
7 product to determine whether it was defective and to allow the
8 seller an opportunity to cure the breach, if any." Wilcox v.
9 Hillcrest Mem'l Park of Dallas, 696 S.W.2d 423, 424 (Tex. App.
10 1985).

11 Plaintiffs concede that they inadvertently neglected to notify
12 Clorox of their Texas warranty claims prior to commencing
13 litigation. However, Plaintiffs claim that they cured this
14 omission by sending a demand letter to Clorox's counsel on April
15 22, 2013 -- over a year after this litigation commenced. Opp'n at
16 23. Citing to Texas Business and Commerce Code section 17.505(a),
17 Plaintiffs argue that failure to comply with the notice requirement
18 merely results in abatement of the claims, not in their dismissal.
19 Id. at 24. However, as Clorox points out, section 17.505(a) is
20 inapplicable here since it relates to DTPA claims, not claims for
21 breach of warranty. Even if post-suit notice were permitted, it
22 was provided too late. The relevant statutory provision, section
23 2.607(c)(1), requires that a plaintiff provide notice "within a
24 reasonable time" after he or she learns of the breach. Plaintiffs
25 allegedly learned of the defects in Fresh Step through the C&D
26 lawsuits, which were filed in early 2011, and Plaintiffs did not
27 provide notice until April 2013.

28 Accordingly, the Texas Plaintiffs' claim for breach of express

1 warranty is DISMISSED WITH PREJUDICE.

2 **3. Unjust Enrichment**

3 Finally, Clorox argues that there is no independent cause of
4 action for unjust enrichment under Texas law. Mot. at 23 (citing
5 Hancock v. Chicago Title Ins. Co., 635 F. Supp. 2d 539, 560 (N.D.
6 Tex. 2009)). As Plaintiffs point out, some Texas courts have
7 treated unjust enrichment as an independent cause of action. See
8 Newington Ltd. v. Forrester, 3:08-CV-0864-G, 2008 WL 4908200, at
9 *4-5 (N.D. Tex. Nov. 13, 2008). However, even this authority
10 recognizes that many courts merely view unjust enrichment as a
11 theory of recovery. See id. And in those cases, a plaintiff must
12 still show that a defendant obtained a benefit through fraud,
13 duress, or taking undue advantage. See id. Thus, to the extent
14 that the Texas Plaintiffs can state a cause of action for unjust
15 enrichment, that claim is duplicative of their other causes of
16 action. Accordingly, the Court sides with the majority of courts,
17 and dismisses the Texas Plaintiffs' claim for unjust enrichment.
18 See Vigo v. Reed, 3:11-CV-2044-G, 2013 WL 786925 (N.D. Tex. Mar. 4,
19 2013); Hancock, 635 F. Supp. 2d at 560.

20

21 **V. CONCLUSION**

22 For the foregoing reasons, Clorox's motion for judgment on the
23 pleadings is GRANTED in part and DENIED in part.

- 24
- 25 • The New York Plaintiff's GBL claims are DISMISSED WITH LEAVE
26 TO AMEND.
- 27 • The Florida Plaintiffs' FDUTPA claim is DISMISSED WITH LEAVE
28 TO AMEND.

- 1 • The Texas Plaintiffs' DTPA CLAIM is DISMISSED WITH PREJUDICE
2 to the extent that is premised on unconscionable conduct and
3 remains undisturbed in all other respects.
4 • Plaintiffs' claim for breach of express warranty is DIMISSED
5 WITH PREJUDICE as to the New Jersey Plaintiff and the Texas
6 Plaintiffs.
7 • Plaintiffs' claim for unjust enrichment is DISMISSED WITH
8 PREJUDICE as to the New Jersey Plaintiff, the New York
9 Plaintiff, the Florida Plaintiffs, and the Texas Plaintiffs.

10
11 Plaintiffs shall file an amended complaint within thirty (30) days
12 of the signature date of this Order. Failure to file an amended
13 complaint may result in dismissal with prejudice of Plaintiffs' GBL
14 and FDUTPA claims. Plaintiffs' amendments should only address the
15 pleading defects discussed above. Any other amendments should be
16 made in compliance with Federal Rule of Civil Procedure 15.

17
18 IT IS SO ORDERED.

19
20 Dated: July 31, 2013



UNITED STATES DISTRICT JUDGE